

Singh (Migration) [2020] AATA 5020 (16 September 2020)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Harpreet Singh
CASE NUMBER:	1831989
DIBP REFERENCE(S):	BCC2018/1265354
MEMBER:	Peter Haag
DATE:	16 September 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Statement made on 16 September 2020 at 4:08pm

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – bogus document – false or misleading information in visa application – incorrect claim regarding educational qualification – applicant worked in the hotel industry – educational institution does not exist – decision under review affirmed

LEGISLATION

*Migration Act 1958, ss 5(1), 65
Migration Regulations 1994, Schedule 2 cls 500.212, 500.217; Schedule 4 Public Interest Criterion 4020; r 1.03*

CASES

*Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 16 October 2018 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s.65 of the *Migration Act 1958* (the Act).
5. The applicant applied for the visa on 16 March 2018. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.500.217(1) of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate was not satisfied the applicant meets public interest criteria (PIC) 4020(1) and the requirements of cl.500.217 of Schedule 2 to the Regulations. Further, the delegate was not satisfied waiver of the requirements of PIC 4020 was justified.
6. The applicant appeared before the Tribunal on 14 September 2020 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
7. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the applicant meets PIC 4020 as required by cl.500.217(1) for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
10. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in a material particular?

11. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
12. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
13. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
14. The issues for determination in this review are:
 - whether there is evidence before the Tribunal that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth:
 - a 'bogus document', as defined in s.5(1) of the Act, i.e. a document that the Tribunal reasonably suspects is a document that:
 - purports to have been, but was not, issued in respect of the person, or
 - is counterfeit or has been altered by a person who does not have authority to do so, or
 - was obtained because of a false or misleading statement, whether or not made knowingly.
 - and
 - 'information that is false or misleading in a material particular' as defined in PIC 4020(5), i.e. information that is:
 - false or misleading at the time it is given, and
 - relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.
15. in relation to the visa application.
16. In this review the Tribunal has read the record of the delegate's decision which the applicant provided to the Tribunal. The Tribunal has also considered the contents of the Department file and the Tribunal file.

17. The applicant does not dispute that he participated in a telephone interview with a representative of the assessing authority, being the Department, that was conducted for a purpose relevant to his visa application. According to the evidence, in the telephone conversation he claimed that, after leaving school he obtained an educational qualification, being a Diploma in Hotel Management. In evidence to the Tribunal, the applicant acknowledged he had not obtained the qualification and that his claim was false. The applicant said he did remember the contents of the telephone call, but that he was nervous at the time, his English was limited and he had been employed in the hotel industry in India, and he claimed those influences may have caused him to falsely state he had obtained a Diploma in Hotel Management. The applicant claimed he did not intend to speak the words "Diploma in Hotel Management" and he did not intend to mislead the Department official.
18. In evidence to the Tribunal the applicant said he did not tell the interviewing official he had any difficulty in understanding him, and he did not tell the official that he had any difficulty in expressing himself in English when he was talking to the interviewing official. The Tribunal is satisfied the applicant appreciated the interview related to the assessment of his visa application, and having regard to the applicant's evidence, the fact that the interview was conducted in the English language does not satisfactorily explain the giving of false information to the official. The applicant's claim that he was feeling nervous when he was speaking to the official does not persuade the Tribunal that the applicant did not intend to give the impugned information to the interviewing official. Furthermore, the Tribunal finds the applicant's claim that he did not intend to say he had obtained a Diploma in Hotel Management, and that he was influenced to make the false statement because he worked in the hotel industry to be inherently implausible and unpersuasive.
19. On balance, the Tribunal is satisfied the impugned information about the Diploma in Hotel Management was given by the applicant purposefully and that it is untrue. Therefore, the Tribunal is satisfied there is evidence before the Tribunal that the applicant gave to the Minister, or a relevant assessing authority, being the Department, information that is purposefully untrue, and that the impugned information is false or misleading in a material particular as defined in PIC 4020; and, the information is relevant to the criteria the Minister may consider when deciding whether to grant the student visa pursuant to cl.500.212 of Schedule 2 to the Regulations. On this basis the applicant does not meet PIC 4020.
20. The applicant provided to the Department in support of the visa application a document that purported to establish he had obtained a Diploma in Computer Application (the Diploma) from Kalawanti Educational & Welfare Society, Budhlada, an educational qualification provided for the purpose of assessing his visa application. As part of the process of assessing the visa application, inquiries were conducted in India on 29 May 2018 into the validity of the Diploma document.
21. The inquiries revealed to Department officials assessing the visa application information that impugned the validity of that Diploma. According to the record of the delegate's decision, a copy of which the applicant provided to the Tribunal, there were two parts to the information:
 - No information could be found regarding the existence of the school named in the Diploma as the educational institution that issued the Diploma. It was observed with apparent concern, that no contact information appears on the face of the document.
 - Information available to the Department about the content and format of the Diploma disclosed that the document is invalid and not recognised in India.
22. The unfavourable information obtained by the Department's inquiries caused the official assessing the visa application to apprehend the Diploma is a bogus document. In response to the Department's invitation to respond to the information that impugned the validity of the

Diploma the applicant claimed the document is genuine. The applicant provided to the Department three documents in support of his claim:

- A signed document dated 16 June 2018 purporting to verify that the applicant studied a computer diploma course from November 2010 to October 2011 at the school named in the Diploma.
- A signed document purporting to be a certificate of registration provided by a Registrar of Societies verifying the relevant institution was registered under the “societies Registration Act.”
- A signed document purporting to certify that Kalawanti Educational & Welfare Society (address provided) met the requirements of a quality management assessment for certain specified activities including computer education. The certifying authority is “SGC”.

23. The applicant claimed in evidence to the Tribunal that the documents are genuine, that the school ceased to operate some time (unspecified) ago, and that is why the Department’s inquiries found no trace of the existence of the school. The applicant made the same claim to the Department in his response to the Department’s concern about that the validity of the Diploma.
24. Relevantly, not one of the applicant’s documents is a certified copy of an original document. The documents have not been supported by plausible affidavit material, or other reasonable evidence capable of independently establishing the validity of each of the three documents. The documents as they stand, considered in combination with the applicant’s evidence that the Diploma is valid; that the school in fact existed but no trace of it could be found because it ceased operations, does not satisfy the Tribunal that the unfavourable information obtained by the Department that impugned the validity of the Diploma is erroneous. The Tribunal gives greater weight to the information that impugned the validity of the Diploma than to the evidence the applicant relies on to establish the Diploma is not a bogus document.
25. On the basis of the evidence considered as a whole, the Tribunal is satisfied there is evidence before the Tribunal that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, or a relevant assessing authority, a document, being the Diploma which the Tribunal suspects is not a genuine Diploma in Computer Application, but that it is a counterfeit document, and therefore a bogus document as defined in s.5(1) of the Act.
26. To summarise the Tribunal’s findings, the Tribunal is satisfied on each of the two alternative grounds considered in this decision that the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

27. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
28. The expressions ‘compelling circumstances’ and ‘compassionate or compelling circumstances’ are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v*

MIBP [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.

29. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
30. The applicant does not claim the requirements of PIC 4020 should be waived; and there is no evidence before the Tribunal capable of establishing the existence of compelling circumstances that affect the interests of Australia, or compassionate and compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, that would justify the granting of the visa.
31. Therefore, the requirements of PIC 4020(1) should not be waived.
32. The applicant does not claim to meet the criteria for any other visa subclass. Consequently, his application has not been assessed against any other subclass.
33. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.500.217(1).

DECISION

34. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Peter Haag
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is **false or misleading in a material particular** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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